L/mal

MAIL DATE
3/21/97

Decision 97-03-057 March 18, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

SYSTEMS ANALYSIS & INTEGRATION, INC., dba SYSTEMS INTEGRATED, a California Corporation, Complainant, vs. SOUTHERN CALIFORNIA EDISON COMPANY, a California Public Utility, Defendant.	Case No. 95-11-005 (Filed November 16, 1995)

ORDER DENYING REHEARING OF DECISION NO. 96-12-023

After reviewing the application for rehearing of Systems Analysis & Integration, Inc. (S&I, or Applicant), and each matter presented therein, the Commission finds no legal error in D.96-12-023, and therefore, denies rehearing.

BACKGROUND AND SUMMARY

In D.96-12-023, we denied the complaint of S&I which alleged that Southern California Edison Company (Edison) violated Cal. Pub. Util. Code Sections 8281-8286 and the Commission's General Order 156 in awarding a contract for the installation of substation automation systems.[1] The statutory and regulatory provisions on which S&I relies concern the inclusion of women, minority, and disabled veteran business enterprises (WMDVBEs) in the procurement of technology, supplies, and services by

1. Unless otherwise indicated, all subsequent references to code sections shall be to the California Public Utilities Code.

California's large, regulated utilities.[2] S&I, a certified "women [owned] business enterprise," alleged in the complaint that its bid for the substation automation contract was illegally and unfairly eliminated by Edison in Phase II of the bid evaluations. The complaint asked the Commission to declare Edison's bidding process noncompetitive and illegal, to enjoin Edison from awarding the subject contract to the company designated by Edison as the winning bidder, to retain jurisdiction to insure lawful competitive bidding, and grant S&I its costs and attorneys' fees.

The complaint and the present application are without merit. First, S&I misconstrues the content and scope of Section 8281-8286, as well as the authority delegated therein to the Commission. Second, S&I fails to establish with record evidence that Edison subjected it to discriminatory treatment.

Sections 8281-8286 and General Order 156 do not require that a WMDVBE, such as S&I, be given a preference relative to competitors, or a guarantee of a contract. D.96-12-023, mimeo, pages 12-13, 19-20. The WMDVBE statutory law was enacted to encourage and increase utility contracting with WMDVBEs, but the law does not impose criteria or procedures that must be used in contract procurement or bidding protocols. Instead, the law is designed to urge the voluntary, good-faith efforts of the utilities. The Commission's General Order 156 reflects the limited mandate of these statutory provisions. To preclude misapprehensions as to the extent of the Commission's authority, General Order 156 expressly provides that penalties will not be

---

2. In the application for rehearing, as well as in D.96-12-023, reference is made only to WMBE, i.e., women and minority business enterprises. However, Sections 8281-8286 were amended in 1990 to include disabled veteran-owned business enterprises, and the Commission's General Order 156 was amended consistent with this legislative change in D.92-06-030. We use in this decision, therefore, the inclusive abbreviation of WMDVBE in discussing the applicable law and regulations.

assessed against a utility for failure to meet the WMDVBE contract procurement goals encouraged by the legislation.[3]

Without addressing the pertinent limitations of the WMDVBE law and General Order 156, S&I's application for rehearing contends that our decision denying Applicant's complaint is unlawful and erroneous "in that it is supported by neither the facts or the law." However, the application fails to articulate the provisions of Sections 8281-8286 under which the Commission could declare Edison's actions unlawful or enjoin Edison from awarding the contract to the winning bidder. Nor does it cite the relevant Commission precedent to which it vaguely refers.

Further, the application fails to identify any material facts from the record that we ignored in D.96-12-023 which would demonstrate that S&I was not evaluated on "a level playing field." Application for Rehearing (January 8, 1997), pp. 2 and 7. Quite to the contrary, we denied each part of the complaint's request because we found, after considering the testimony and evidence presented in lengthy and detailed hearings, that Edison had treated all competing bidders equally with respect to information provided and selection criteria applied. See D.96-12-023, pp.5-10, 13-17, 20-24. The application does not identify one item of information provided to all bidders, except S&I, or one criterion that Edison applied to S&I and not to the

---

3. Prior to December, 1995, Rule 6.13 of General Order 156 provided: "Except for any penalty imposed as a result of a commission-initiated investigation, no penalty shall be imposed for failure of any utility to meet and/or exceed goals." In December 1995, the Commission issued D.95-12-045 in a rulemaking proceeding initiated by the Commission. In that decision, the Commission modified General Order 156, and among other things, renumbered Rule 6.13 to Rule 8.12 and amended it to read: "No penalty shall be imposed for failure of any utility to meet and/or exceed goals." The amended rule was based on the Commission's recognition that the enabling statutory law does not authorize a penalty for the failure of any utility to meet or exceed goals in recruiting and contracting with WMDVBEs. D.95-12-045, page 11.

other competitors in the process that led to S&I being eliminated from consideration in Phase II of the bid evaluations.

Upon review, we believe that S&I's application is based on what might be called bidder's remorse and seeks to challenge the weight Edison gave to the different elements of the competing bids to distinguish the bidder most suitable for supplying Edison's substation automation system. But S&I misplaces its reliance on Sections 8281-8286 and General Order 156 for legal authority that would make Edison's actions in this bid competition illegal. In addition, S&I's application does not identify any acts by Edison which did not impact all competitors equally in Edison's selection of the bid which could provide the best overall value. See Tr. Vol.5, p.833, lines 15-28 to p. 834, lines 1-7.[4] Nor does it substantiate that Edison improperly withheld material information Edison possessed at the start of the bidding process which it revealed only later to the detriment of S&I and to the unfair advantage of the other competitors.

On, January 22, 1997, Edison filed a response to the application for rehearing. Edison observes that our decision carefully reviewed Applicant's claims and made no mistakes of fact in ruling on those claims. Edison also notes that Applicant misinterprets the provisions of the statutory and administrative WMDVBE provisions.

---

4. See also Rule 7.2 of General Order 156 which provides that with respect to WMDVBE matters: "The Commission will not, however, entertain complaints which do not allege violations of any law, commission rule, order, or decision, or utility tariff resulting from such Commission action, but which instead involve only general contract-related disputes between a utility and an existing or prospective WMDVBE, such as failure to win a contract award." After a rigorous hearing of the issues, and careful consideration of S&I's filings and application for rehearing, we believe that S&I simply failed to win the contract because of the judgments it freely made in responding to Edison's request for bids. This result, though unfortunate for S&I, is not one the Commission can retract or enjoin since we do not find any violations in Edison's bid review process in this case.

STANDARD OF REVIEW

Section 1732 requires that an application for rehearing specifically set forth grounds on which the applicant considers the Commission decision "unlawful." In responding to an application for rehearing, we review our decision for legal errors specified by the applicant, and as may be related to those specified. Therefore, consistent with the requirements of Sections 1705 and 1757, we here consider the legal question whether D.96-12-023 rests on material findings of fact sufficient to reasonably conclude, as we did, that: 1) the elimination of S&I's bid in Phase II of Edison's review did not violate statutory law or Commission regulations, and 2) Edison maintained a level play field in administering its bidding process.

DISCUSSION

S&I's application is not persuasive. It fails to support its contentions that our decision incorrectly applied Sections 8281-8286 and the provisions of our General Order 156 to the facts of the case, and that the Commission ignored material facts regarding the fairness of Edison's bidding process.

WMDVBE Statutory Law and General Order 156

S&I does not establish any mistakes of law in D.96-12-023. S&I's basic argument is that Edison violated the WMDVBE statutory provisions by not giving enough weight to its inclusion of elements of WMDVBE participation in its bid, and by allowing other bidders, who included little or no WMBE participation in their original proposals, to become finalists after S&I was disqualified from further consideration. Application, p.8-9, and fn.8.

In D.96-12-023, at pp. 19-20, we addressed this issue and explained that Sections 8281-8286 do not impose a legal obligation on the utilities to weigh a WMDVBE in a certain way and that "in the final analysis, like any other competitor, the minority supplier or contractor must prove to the satisfaction of

the utility that hers is the best product." The law does not require that a utility assign certain values to a competing a WMDVBE, or that the utility weigh WMDVBE status in a certain manner relative to other factors considered in selecting the winning bid. There is no provision of the law requiring that a utility assign a fixed percentage of a fixed number of points to a WMDVBE in evaluating competing bids. S&I fails, furthermore, to identify any part of Sections 8281-8286 which would require that Edison award a contract only to a bidder who proposes in its original documentation a certain amount of WMDVBE participation in the contract, as S&I claims. Application, p.11.

Essentially, the law only requires that utilities subject to Sections 8281-8286 make a good faith effort each year to fairly include WMDVBEs in their procurement contracting, and directs the Commission to report the results to the legislature on an annual basis. To implement this policy, the Commission in General Order 156 requires that utilities subject to the WMDVBE provisions file annual reports on the relative percentage of contracts awarded to WMDVBEs.

The Commission's September 1, 1996 report to the legislature includes the results of Edison's procurement efforts for 1995, the year S&I competed for the substation automation system contract. Table 1A of the report indicates that in 1995 Edison's direct contracting and subcontracting with women business enterprises (WBE) constituted 12.56% of total contracting dollars, and the combined WMDVBE contracting constituted 26.77% This represents an increase from 9.47% WBE contracting, and 25.37% total WMDVBE contracting in 1994.

These results do not indicate that Edison rejected or conspired to scuttle or evade the policy intended by the legislation to enlist more minority businesses in utility contract procurement efforts, and does not lend any support to a complaint that Edison did not make a good faith effort to include WBEs, of which S&I is one, or WMDVBEs in general, in its contract procurement program. We found in D.96-12-023, and we confirm

here, therefore, that Edison did not violate a law which the Commission is mandated to enforce, and did not demonstrate any disregard of the policy stated in Sections 8281-8286, when it selected a contractor other than S&I for its substation automation systems in 1995.

Bid Evaluation Process

Although limited in its mandate under Section 8281-8286, the Commission does require that a utility deal fairly with those who compete for a supply or service contract, including WMDVBEs, so that all competitors are evaluated on a level playing field. D.96-12-023, p.20.[5] This policy is not dependent on Sections 8281-8286, but has evolved pursuant to the Commission's general authority to determine whether a public utility grants "any preference or advantage" or subjects any corporation or person to "any prejudice or disadvantage." Section 453(a).

However, in its application for rehearing, S&I does not demonstrate that it was subject to any prejudice or disadvantage because of actions taken by Edison. Further, it does not establish that we ignored material facts relevant to this issue, or adopted findings which are not based on a sufficient record. Instead, in unsupported, conclusory accusations, S&I merely contradicts what we reasonably determined from the record in D.96-12-023, that S&I's bid was evaluated according to the same

---

5. See: D.96-07-005, mimeo p. 3 - "All that the law requires is that the utility provided a 'level playing field' for those seeking to provide goods and services to qualified utilities"; D.93-02-11, mimeo, p.7 - a "level playing field" is critical to the public interest; D.93-10-054, mimeo, p.5 - the Commission requires the good faith of utilities in negotiations leading to contracts. D.91-01-012, mimeo, p.11 - "The [WMDVBE] legislation and implementing order are intended to help establish a level playing field, not to give special advantage to particular players."

criteria applied to other bids, and S&I was informed of the same information provided to other competitors.

During the two-week hearing of this case, extensive testimony and voluminous documentation was presented on this point. In our decision, we adopted the findings of the presiding Administrative Law Judge (ALJ) who assessed the credibility of the witnesses, and who reviewed the documentary exhibits which were received in evidence. We concluded that:

> "...we are impressed by the lengths to which the [Edison] evaluation team went to protect the integrity of the evaluation process and to insure that all bidders were treated fairly and equally." D.96-12-023, p. 23.

In reaching our conclusion, we considered S&I's contention that its "bid was eliminated as a result of an ad hoc, subjective review of bids controlled by a few Edison engineers unhappy with the results of Edison's formal evaluation process." Application for Rehearing, p.2. We discussed at length the Phase II "commercial review" and the "technical review" that was described in great detail by the witnesses. D.96-12-023, pp.8-9, 21-24 - wherein we referenced sworn testimony recorded in the transcript at pp.182-261.

For example, Edison's witness, Patricia Yee, testified to an evaluation procedure that was thorough and that was applied to each of the bidders against whom S&I was compared. Ms. Yee indicated that after the initial informational meeting (also called a "rollout") and the issuance of a request for proposals (RFPs), individual members of the team independently reviewed each of 29 proposals, one of which was S&I's. Tr.Vol.2, pp.185-188, 192. She described how the proposals in this first group were ranked, and a "short list" of nine selected. S&I was one of the nine at this stage.

Ms. Yee also described Edison's further evaluation of the nine contenders in Phase II to determine if each warranted a visit by Edison at the bidders' respective sites and discussions

on specific aspects of the proposals. The Phase II evaluation was conducted by a technical team and a commercial team. Tr. Vol.2, p.200-201. Ms. Yee described how the commercial team looked at "...all of the business issues to take a more refined look at those." Tr. Vol.2, p.204, lines 6-8; also, p.208. As a result of this review, the commercial team determined that there were no business reasons for recommending that any of the nine not continue to the next stage of the review process. Tr. Vol.2, p.206, lines 3-7.

In our decision, we also discussed the testimony of another witness for Edison, Bernaise Adamson. D.96-12-023, pp.22-223 - wherein we reference the transcript at pp.261-436. In a painstaking examination by S&I's counsel, Mr. Adamson explained how the technical review of the proposals of the nine bidders on the short list proceeded in Phase II, and described how the requirements applied in reviewing the short list were related to the criteria originally announced by Edison when they sent out the RFPs. Tr. Vol.2, p.307-312.

Importantly, at no point in the examination of Mr. Adamson during the hearing or, for that matter, in the application for rehearing, does S&I identify any aspect of the technical evaluation process which was applied only to S&I and not to the other eight contenders in Phase II. Mr. Adamson's testimony revealed instead an evenhanded analysis of the technical elements of S&I's proposal in comparison with those provided by the other competitors. See e.g. Tr. Vol.3, pages 370-384. Among other things, he explained that some of S&I's proposed designs were found by the team to be nonresponsive to the requirements of the RFP, and two others were deemed technically unworkable and unreliable. Tr. Vol. 3, p.370, lines 13-28; p.375, lines 2-9; p.376-378. When questioned about the value given to the lower cost of the project as proposed by S&I, Mr. Adamson explained that Edison was seeking the best overall value; therefore, the lower cost proposed by S&I was far outweighed by the fact that S&I's design was technically not

acceptable. Tr. Vol. 3, p.381, lines 13-28; p.383, lines 5-8; p.384, lines 13-18. Also, Tr. Vol.5, p.833, lines 15-28 to p.384, lines 1-7.

S&I is unpersuasive, therefore, where it argues that our denial of its complaint in D.96-12-023 is based on mistakes of material fact regarding the fairness of the procedures Edison used in analyzing the bids and then eliminating S&I as a contender in the procurement process. S&I does not demonstrate that Edison, at any point in the bid competition, failed to provide S&I with the same information it provided other contenders with respect to technical elements desired by Edison. Nor does S&I show that Edison applied a set of criteria to S&I which were not also applied to other contenders with whom S&I was compared.

S&I also is incorrect in claiming that we did not consider its argument that Edison allegedly changed its criteria as it proceeded in the evaluation process and thereby discriminated against S&I. We in fact examined this issue in detail in D.96-12-023 at pp. 14-18. We note, in passing, that S&I does not complain Edison had no right to winnow the list of 29 down to nine bidders, of which it was one, based on a more refined review of proposals based on Edison's substation system needs.

S&I alleges that unlike other bidders, S&I was unfairly misled by Edison's original instructions. S&I claims that bidders were informed "not to include extra items in its bid if they increased the amount of the bid," but that Edison did consider items which S&I argues are extras. Application for Rehearing, p.6. Unfortunately, S&I does not refer us to the page or document where we can locate the language it places in quotation marks.

In any event, in D.96-12-023 we did consider Edison's original instructions as provided in a July 26, 1995 letter to S&I, and to other potential bidders, regarding a "rollout" on a

request for substation automation proposals. See D.96-12-023, pp. 15-16.

Furthermore, we determined in D.96-12-023, and we confirm in this present review, that Edison did not violate the WMDVBE laws or regulations, and did not treat S&I in an unfair or discriminatory manner, when it applied a "Design Philosophy" in Phase II to distinguish the proposals warranting further consideration. See D.96-23-023, pp. 14-18, 20-24; Application for Rehearing pp. 5-6. The testimony of Mr. Adamson, to which S&I refers on this point in its application, clearly shows that criteria used in the "Design Philosophy" were consistent with the broader standards previously announced to all contenders, and applied to all.

Mr. Adamson explained that he reported the progress of the evaluation group to a Mr. Montoya, a management liaison, and indicated that the team was still considering three of the nine on the short list. Mr. Montoya then asked that the team look again at all nine to determine whether there was good reason to expend Edison resources on site visits to each of the nine. Tr. Vol.2, pp.3-7-308. Mr. Adamson testified that the commercial and technical teams then split up to apply "a fine tooth comb" and a design philosophy to the nine proposals. Tr. Vol.2, p. 310, lines 17-27. He described the design philosophy as including basic technical requirements:

> "The design philosophies are simply some basic common sense design or engineering categories that I think any engineer or software person would use to evaluate a computerized system or any other network system. It was just a way for us to put down on paper those common sense goals that any automation system could be compared to. Tr. Vol.2, p.311, lines 15-22.

Mr. Adamson also testified to the link between the categories listed in the design philosophy document and the original request for proposals (RFPs):

> "Some of these actually come right out of the RFP. I don't know that we looked at the RFP to find them or if they were just so common sense that we came up with them twice independently. But most of these things are consistent with what's in the RFP. " Tr. Vol.2, p.312, lines 10-15.

We note that when Mr. Adamson was subsequently recalled to testify, he further explained that the original information given to all potential bidders included a statement that Edison expected bidders "...to explore high value, state-of-the-art technology," meaning Edison was looking for the highest value in an automation system reflecting rapidly progressing technology. Tr. Vol.5, p.868, lines 16-28. He also testified that the bidders were initially told that they did not have to rely solely on designs proposed by Edison, that they could submit their own designs. Tr. Vol. 5, p. 869, lines 2-13.

Given the standards presented at the initial stages of the competition, it is reasonable to conclude that all bidders, including S&I, had the opportunity in preparing their proposal to be creative and use any technical design and specifications they thought would be successful. As we found in D.96-12-023, therefore, S&I was not kept in the dark about Edison's bid evaluation criteria, and that Edison's procedures in applying the criteria were not unfair to S&I. Edison provided all bidders the same information, and applied the same evaluation procedures and criteria to S&I and to its competitors. S&I, therefore, was eliminated in Phase II when all bidders were on a level playing field. [6]

---

6. This is not to imply that Edison proceeded after Phase II in an unfair or discriminatory manner. However, what Edison did after S&I was eliminated as a contender does not alter the fact that S&I's bid proposal, developed on the same information that all other bidders relied on, was determined to be unacceptable because of its technical specifications.

In failing to make an evidentiary showing of discriminatory treatment, as well as not identifying material facts S&I claims we overlooked in D.96-12-023, S&I merely attacks Edison's review process with innuendo, vague descriptive terms, and conclusory allegations. For example, at page 3 of the application for rehearing, S&I implies some insidious meaning to Edison's evaluation team being "concerned" with the process. But S&I does not explain how that concern impacted S&I prejudicially. S&I also chooses to describe some steps of the process as "formal" and some as "informal," again without showing that one or the other resulted in unfair treatment.

S&I also accuses Edison of suddenly deciding to use a new set of evaluation criteria in a process which S&I condemns as including "irregularities." The accusation vaguely contradicts the testimony of Edison's witnesses, discussed above, but S&I does not substantiate how Edison's use of evaluation criteria constituted "irregularities" which violate the law or which impacted S&I unfairly.

S&I further claims in its application, at page 4, that Mr. Adamson was "the only witness to this event," and that he was not a trained or licensed engineer. Here S&I directs us to the transcript at page 261, lines 22-25 where Mr. Adamson states he does not hold a degree in engineering or related technical subjects. This transcript reference, however, does not prove that Mr. Adamson was "the only witness to this event." Moreover, S&I does not direct us to any testimony that would undermine the technical expertise of Mr. Adamson. S&I significantly neglects to reference us to the unchallenged testimony regarding the extensive training of Mr. Adamson starting in 1981 when he started work with Edison as an apprentice electrician, to the present, and his qualifications as a division technical instructor. Tr. Vol.2, p.262, lines 18-28 to p.263, lines 1-14. S&I's application also omits any critique of technical errors in Mr. Adamson's lengthy testimony regarding

specific elements of automation systems. See Tr. Vol.5, pp. 833-880; Vol.6, pp. 888-931.

As a result, S&I fails to persuade us that one unqualified person unfairly ruled out S&I as a bid contender. And as we have discussed here, S&I's general contention that we ignored or improperly weighed any evidence of discriminatory actions by Edison's bid review team is also without merit.

CONCLUSION

The Legislature did not authorize the Commission to prescribe or enforce bidding processes or evaluation criteria in connection with the WMDVBE program. With respect to encouraging regulated utilities to contract with WMDVBE suppliers and services, our authority reaches only to the generally applicable requirement that the utility provide a "level playing field" in its contract procurement practices. Based on the extensive record in this case, including two weeks of testimony, we decided in D.96-12-023 that S&I was treated as all other bidders were treated, and, therefore, denied S&I's complaint alleging Edison acted unlawfully in disqualifying S&I's bid.

Having considered all allegations of error in our denial of S&I's complaint in D.96-12-023, we are of the opinion that good cause for rehearing of our decision has not been shown.

IT IS THEREFORE ORDERED that:

1. Rehearing of D.95-11-005 be denied.
2. This order is effective today.

Dated March 18, 1997, at San Francisco, California

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners